LEE THIAM v. FATIMAH BINTE SALLEH

[F.C. (Raja Azlan Shah C.J. (Malaya), Chang Min Tat & Syed Othman F.JJ.) March 5 & November 29, 1980]
[Kuala Lumpur — Federal Court Civil Appeal No. 74 of 1978]

Tort — Negligence — Road accident — Appellant wholly liable for accident — Damages for loss of dependency.

Damages — Loss of dependency.

In this case the respondent had claimed damages for herself and the dependants of her deceased husband who died in a motor accident. The learned trial judge found on the facts that the appellant was wholly liable for the accident and he awarded $17,800.00 as damages for loss of dependency. The appellant appealed.

Held: (1) in the circumstances of this case the finding of the trial court that the appellant was wholly responsible for the accident should not be disturbed;

(2) the appeal regarding damages must also be dismissed as the court was not in a position to say that the learned trial judge was wrong in his assessment of loss of dependency.

HIGH COURT.

B.G. Martin for the plaintiff.

Ong See Seng for the defendants.

Cur. Adv. Vult.

Ajaib Singh J.: The plaintiff in this case claimed damages for herself and the dependants of her deceased husband who died in a motor accident. In her statement of claim she averred that on December 19, 1971 the deceased was riding his motorcycle along Batu Kikir-Bahau main road when the 1st defendant who was driving a motor-van collided with the deceased's motorcycle resulting in the death of the deceased. She alleged that the accident was caused solely by the negligence of the 1st defendant and she gave particulars of the alleged negligence. The deceased was a rubber tapper and odd-job labourer and at the time of his death he was 43 years old. His monthly income was about $200 and he gave $180 per month to the plaintiff for household expenses. The deceased took two meals a day at home at an estimated cost of $20. The dependency loss was therefore $160 per month.

In their defence the defendants admitted that there was a collision between the motor-van which was driven by the 1st defendant and the motorcycle ridden by the deceased along Batu Kikir-Bahau main road but they denied that the collision was caused by the negligence of the 1st defendant. They averred that the accident was caused solely by the negligence of the deceased and they too gave particulars of deceased's negligence.

The plaintiff called three witnesses. Romini binti Maarof (PW1) said that on December 19, 1971 between 10 a.m. and 11 a.m. she was in a shop at a kampong along the main road leading to Batu Kikir and she saw a van passing along that road which collided into a motorcycle. She was buying vegetables in the shop at that time and she heard a bang and saw that a van had collided into a motorcycle.

In cross-examination she said that after the accident she went up to the scene and found that the motorcyclist who was knocked down was her own father. She did not see exactly how the collision took place. In answer to the court PW1 said that the shop was by the road-side and facing the road from the shop the accident took place on the right side. She did not know from where the van or the motorcycle had come. The place of accident was about 20 yards from the shop. There were no other vehicles on the road before or after the accident. When she went up she saw that her father was the motorcyclist. The motorcycle was lying on the grass verge. The van had moved off and it was no more there when she reached the scene.

Fatimah binti Salleh (PW2) the plaintiff in this case said that at the time of the accident her deceased husband was a rubber-tapper earning approximately $100 per month. He tapped rubber in the mornings and worked as a hired man to cut firewood and grass in the afternoons. From this odd-job work he earned about $150 per month. The deceased gave the plaintiff $100 per month. The household expenses were paid by the deceased and also some by her from the $100. She had 7 children. The two eldest were married. Her husband and herself supported the other five children who lived with them at the time of the accident.

In cross-examination PW2 said that she did file a civil action in Kuala Pilah Sessions Court in 1972 against the same defendants. When she went to the court she was told that the case would be handled in the High Court. She said that she remembered telling her previous solicitor that her husband earned $100 per month but she said that her husband gave her $100 per month and not $90 as mentioned in the lower court civil action. She said that she told her previous solicitor that the deceased earned $150 per month as an odd-job labourer although this did not appear in the civil action filed in the lower court. She said that she was not shown the particulars of her claim in the lower court.

Atan bin Maarof (PW3) a son of the deceased said that his father was a rubber-tapper and besides that he did odd jobs in the afternoons picking firewood and doing gardening work. From these odd jobs he earned $4 to $5 per day and in a month he would work for about 25 days.

At this stage I recalled PW1 and in answer to my questions she said that when she went up to her father she saw him lying on the road but she could not remember where exactly he was on the road.

The 1st defendant Lee Thiam (DW1) said that on December 19, 1971 he was employed as a salesman by 2nd defendant and in the course of his work he had to drive his employer's motor-van. On December 19, 1971 at about 10.30 a.m. he was involved in an accident along Batu Kikir-Bahau road. He was driving the van alone and was proceeding from Bahau to Batu Kikir. On arriving at a straight stretch of road with padi fields on both sides he saw a motorcyclist coming out suddenly on his right and encroached into his side of the road. He applied the brakes but could not avoid the accident because the motorcycle was too near. DW1 said that the impact took place on his side of the road. The road was slightly wet but there was no rain at that time. After the

collision he did not stop as he was afraid of assault. Later he lodged a report at the Segamat Police Station. That was the first time he had met with an accident. He said further that there were no shops around the scene. He did not know whether the police went to the scene to investigate but they took photographs of his motor-van not on the same day but a few days later.

In cross-examination the 1st defendant pointed out the place of impact in the sketch plan. He agreed that there was no side road at the place but said that there were a lot of side paths on the right but none on the left. He put another mark on the sketch plan indicating the path from where the motorcyclist had come out. He said that he did apply his brakes and when questioned about his police report wherein he had stated that he did not apply his brakes DW1 said that he tried to apply his brakes but it was too late. He said that the truth was that he wanted to apply his brakes but could not. He denied that he was travelling at an excessive speed, that he failed to keep a proper look out and that was the reason why he could not apply his brakes. He said the motorcyclist came out of the side path all of a sudden and his van hit the rear of the motorcycle. To a question that if the motorcyclist had shot out from the side road the impact would be horizontal DW1 said that the motorcyclist had already turned to the right along the same path as he was proceeding. He said that the motorcycle had already encroached on to his side of the road and the collision took place on his side of the road. When shown photographs of the scene DW1 said that the side path was somewhere in the top left photograph.

In re-examination the 1st defendant said that when the motorcycle came out he (1st defendant) was travelling on his correct half of the road at about 35 miles per hour and the deceased encroached onto his path. There was no speed limit on that stretch of road.

In answer to the court DW1 said that the off-side front headlamp of his van hit the motorcycle and the motorcyclist fell at the centre of the road and the motorcycle fell on the road near the deceased. He said he did not know how it was shown off the road in the sketch plan. He said that there was a grass verge on both sides of the road and there was no traffic or pedestrians on the road at that time.

At the end of the trial I held the plaintiff's case proved against the defendant who was wholly to be blamed for the accident. At the place where the accident occurred the sketch plan and the photographs show no side path on the right. In all probability the deceased was riding his motorcycle straight ahead in the centre of the road when he was hit by the 1st defendant's van. The path indicated by the 1st defendant on the sketch plan is almost directly opposite the place of impact and if the deceased had suddenly come out of that path he would not have been hit from behind. Also it would have been suicidal for the deceased to come out straight into the path of the van. The accident occurred during the day-time and both sides of the road were open padi fields. The deceased would have in all probability noticed the van if he was indeed coming out of a side path. Even if the deceased was riding along the centre of the road — as it would appear judging from the position of the blood marks and glass on the road — it was still the duty of the 1st defendant to take all reasonable care to avoid hitting the motorcyclist from behind, like sounding his horn and reducing his speed but he did nothing to avoid the accident. The 1st defendant's version that after coming out of the path the motorcyclist was travelling ahead of him tends to show that the 1st defendant failed to keep a proper look out by not avoiding the motorcyclist who was riding ahead of him and with no other traffic on the road.

On quantum I accepted the evidence of the plaintiff that the deceased was earning about $250 per month and I assessed the loss of dependency at $150 per month for 14 years purchase which came to $17,800. I also awarded special damages at the agreed sum of $550 with the usual interest and costs.

From the above judgment the 1st defendant appealed to the Federal Court.

FEDERAL COURT.

B.G. Martin for the appellant.

Ong See Seng for the respondent.

Cur. Adv. Vult.

Syed Othman F.J. (delivering the judgment of the Court): In this running down case the learned trial judge at Seremban gave judgment for the respondent. He found the appellant wholly liable for the accident and awarded damages for loss of dependency. The grounds of appeal are mainly on facts.

The accident happened about the middle of Bahau-Batu Kikir road between a van driven by the appellant and a motorcycle ridden by the deceased. The deceased died of injuries from the accident after being taken to hospital. The only witness to the accident on the plaintiff's side was the daughter of the deceased. According to her, on the morning in question she was shopping at a shop along the road and heard a bang and saw that a van had collided with a motorcycle; she went to the spot about 20 yards from the shop and saw that the motorcyclist was her father; the motorcycle was lying on its side on the grass verge on the right side of the road about 23 ft. further up where the accident occurred, with its front wheel in the direction of Bahau; the van had left the scene; she did not see how the collision occurred; she could not tell from where either vehicle had come.

The evidence of the appellant was that he was driving the van along the road proceeding from Bahau to Batu Kikir. The road was straight with padi fields on both sides. The motorcyclist came out suddenly from the right side of the road and encroached onto his side (left) of the road. He applied the brakes but could not avoid the accident as the motorcycle was too near. He admitted hitting the motorcycle from the rear. The road was wet but it was not raining at the time. After the collision he did not stop for fear of being assaulted. According to his report to the police the damage on the van was at the front

on the top of the mudguard but he did not say which mudguard.

After hearing the evidence the learned trial judge was satisfied that the van must have hit the motorcycle from the rear as it was travelling on the road. This is supported by the fact that the motorcycle had been pushed forward by 23 ft. as indicated above. He did not believe the defendant's version as there were too many conflicts in his evidence. In evidence, he said he applied the brakes and that it was not raining at the time but in the police report he said he had no time to apply the brakes and that it was drizzling at the time. He was shown the sketch plan which showed no side path. He then marked opposite the spot of the accident showing a side path on the right side of the road at the end of the padi field, but did not call the investigating officer to support his evidence that there was in fact a side path as indicated by him on the sketch plan.

Assuming that the appellant's evidence is the correct version, i.e. that the deceased had come out from the kampung path on the right side of the road, the appellant must have seen him among the padi fields approaching the road and should have taken care by slowing down to ascertain where he was going to or he should have at least given some warning of his approach. In any case, on his own evidence when the motorcycle was approaching the centre, there is nothing to show that he took evasive action by moving slightly to the left. If the accident had happened the way he described it, the motorcycle would not have been hit from behind, as the learned trial judge found, and in the centre of the road. The sketch plan shows that 'X' blood spot is just at left side of the centre line but the red broken glass pieces from the motorcycle's lamp are on the right side of the road near the centre line. Knowing a motorcycle, the red broken glass pieces on the road must have come from the rear lamp or reflector of the motorcycle. On this evidence, it is clear that the van must have been all the way travelling on the crown of the road and it must have hit the motorcycle from the rear after the motorcycle had straightened out on the right side of the road, and not, as the appellant said, while it was on the left side of the road in the path of the van. If the van had only kept to its side, it would not have hit the motorcycle.

In the circumstances of the case we do not think that we should disturb the finding of the trial court that the appellant was wholly responsible for the accident.

One ground of appeal is against the quantum of lose of dependency awarded. The learned trial judge accepted the evidence of the respondent that the deceased had been earning $250 a month and he assessed the loss of dependency at $150 a month, and with 14 years purchase he came to the figure of $17,800. Special damages were agreed at $550.

The deceased was 43 years old when he died. In the statement of claim the respondent said that the deceased's monthly income was $200 a month, gave her $180 a month for household expenses and took two meals a day at home at the estimated cost of $20 a month and that the loss to dependants was therefore $160 a month. In evidence the widow said:

"'He' (the deceased) 'gave me $100 per month. The household expenses were paid by deceased — and also some by me from the $100.'"

She was very severely cross-examined on this in reference to a suit in Kuala Pilah Sessions Court in 1972 against the same parties. From the statement January-November, 1972, of the estate where the deceased had worked, he received on the average $100 a month, varying from the lowest $81.52 for February to highest $120.55 for July. The indications are he was a casual worker working in the morning only. She denied having told her former solicitors that the deceased had given her $90 a month. She insisted that she was paid $100 a month and that she did tell the solicitors that the deceased had earned an extra income of $150 a month as an odd job labourer. The fact that the deceased got extra income by doing odd job was confirmed by his son (PW3). Further, in a Malay family in the kampung it is reasonable to expect that a husband will give the wife a fixed amount and at the same time do the marketing and purchase the daily requirements of the house. It is clear from the findings of the learned trial judge considering the number of dependants of the deceased, the suggestion by the appellant's counsel that the deceased would have given respondent only $70 a month as the overall household expenses was unreasonable. The manner in which the appellant's counsel tried to discredit her evidence on this point cannot be considered to be satisfactory. The proceedings in the Sessions Court were not even produced. If she did not give evidence the way she had instructed her former solicitors, then evidence should have been adduced to show that what she had told the former solicitors was true, or, at least it should have been shown that the deceased could not have earned $250 a month, as a rubber tapper and odd job labourer at the time of his death. The fact that the deceased had a motorcycle shows that he must have earned about this figure. Considering the circumstances we do not think we are in a position to say that the learned trial judge was wrong in his assessment of loss of dependency and, in particular, in finding that the deceased had spent about $150 a month on the family. 14 years of purchase too, we consider to be reasonable, as according to the "Vital Statistics Peninsular Malaysia, 1977", page 255, the expectation of life of a male Malay at 43 is about 29 years.

The appeal is dismissed with costs as agreed by parties with usual interest to be paid from date of judgment to date of realisation. $500 deposit to respondent on account of costs.

Appeal dismissed.

Solicitors: *Mah-Kok & Din; B.G. Martin & Co.*